S.B. Civil Writ Petition No.1140/2004
Mohan Lal Vs. The Addl. District & Sessions Judge No.3 & Anr.

24.01.2007

Hon'ble Shri Justice Mohammad Rafiq

Shri Ravi Yadav for petitioner.
Shri Madhav Mitra)
Shri Vikramaditya Shekhawat) for respondent no.2 and 3.

REPORTABLE

This writ petition has been filed by the petitioner Mohan Lal challenging the order dated 8.1.2004 passed by Additional District and Sessions Judge (Fast Track) No.3, Jaipur.

The facts in brief are that plaintiff Moti Lal and defendant Phool Chand are real brothers. A Civil Suit was filed by respondent no.2 and 3 namely Moti Lal and Smt. Rudi with the prayer that the sale deed dated 23.12.1998 be set aside and a permanent injunction be

issued against the defendant Mohan Lal and Phool Chand restraining them from interfering in the enjoyment of the suit property by the plaintiff.

During the pendency of the aforesaid Civil Suit an application under Order 32 Rule 15 CPC was filed by Moti Lal inter alia on the premise that the defendant no.2 Phool Chand was man of unsound mind and, therefore, was not capable of protecting his interest. In the application it was prayed that Smt. Sobhagwati who was sister of both the plaintiff Moti Lal and the defendant Phool Chand, be appointed as the guardian of defendant Phool Chand to protect his interest. The plaintiff Moti Lal produced medical certificate issued by Superintendent, Psychiatric Centre,

Jaipur dated 28.5.1999. It was certified therein that after detailed history, examination and psychodiagnostic test, the patient (Phool Chand) was found to be suffering from Moderate Mental Retardation. On Psychological test his mental age was found to be seven and a half years though actually he is 53 years old. The learned trial court after hearing the arguments of parties allowed the said application and appointed the aforesaid Smt. Sobhagwati as the guardian of defendant Phool Chand. It is this order which is impugned in the present writ proceedings.

I have heard Shri Ravi Yadav, learned counsel for the petitioner and Shri Vikramanditya Shekhawat with Shri Madhav Mitra, learned counsel for

respondent no.2 and 3 and perused the material on record.

Shri Ravi Yadav, the learned counsel for the petitioner argued that the order appointing guardian always precedes determination of the fact that the person whose guardian is sought to be appointed is of unsound mind and that such person is mentally incapable of defending his own interest. According to him such order ought to have been passed after making an enquiry as provided for by Order 32 Rule 15 of the Civil Procedure Code. The learned trial court has solely based its order on the report submitted by the Superintendent, Psychiatric Centre, Jaipur. He submitted that the Court has not made any enquiry and has not even required any medical expert or the author

of the medical certificate to appear as witness and prove the facts with regard to mental unsoundness or incapacity of the defendant Phool Chand. He argued that the aforesaid Shri Phool Chand was very much a person of sound mind and capable of understanding implications of his actions in as much as he out of his free will executed a sale deed in favour of the petitioner which was duly registered before Sub-Registrar, Tehsil, Amber which office is also for certain purposes considered as a Court. The application filed by the plaintiff Moti Lal was contested by defendant Phool Chand himself who filed reply thereto and contended that he was a man of sound mind and was having the right to take his own decision with regard to the property

owned by him. According to the averments of the said reply, Phool Chand stated that his brother Moti Lal wanted to grab his share of property and therefore was bent upon declaring him as a person of unsound mind. Shri Ravi Yadav in support of his contention relied on the decision of Kerala High Court in Balakrishnan Vs. Kalliyani reported in AIR 1957 Kerala 51.

On the other hand Shri Vikramaditya Shekhawat and Shri Madhav Mitra, learned counsel for the respondents strenuously opposed the writ petition and argued that the medical report produced by the plaintiff Moti Lal in support of his application duly proved the factum with regard to the mental unsoundness of the defendant Phool Chand. This report was prepared at the instances of Police

Station Amber in connection with the investigation of FIR No.87/99 which was filed by the plaintiff against the petitioner for offences u/s. 420, 468, 471, 482 read with Section 34 and 120B IPC. The report can neither be said to be ingenuine nor forged one nor is it the case of the petitioner either. He submits that when the medical authorities have already subjected the defendant Phool Chand to medical examination by keeping him admitted in their hospital as an indoor patient for a period of 10 days and have assessed his mental age to be seven and a half years, this would satisfy the requirement of enquiry contemplated by Order 32 Rule 15 of the CPC. The learned trial court has duly taken note of all these facts and has

rightly come to hold that defendant Phool Chand was a person of unsound mind and therefore did not commit any error of law in appointing Smt. Sobhagwti as his guardian. It was further submitted by them that the judgments relied upon by learned counsel for the petitioner are distinguishable on facts.

A careful analysis of the provisions contained in Order 32 Rule 15 would make it clear that such provisions have been engrafted in the code in order to safeguard the interest of the persons who upon enquiry are found by the Court to be incapable, by reason of any mental infirmity of protecting their interest when suing or being sued. What should be the nature and kind of enquiry to determine the fact that the defendant

Phool Chand was incapable of protecting his interest when being sued is the core question that requires determination in the present proceedings. Kerala High Court in the case of Balakrishnan (supra) which has been cited by learned counsel for the petitioner had the occasion to consider this question. It was held by the Court as under:-

> “To treat a person as one incapable of protecting his own interests by reason on unsoundness of mind or mental infirmity, is a very serious matter and it is in recognition of the seriousness of the matter that the legislature has insisted on a proper inquiry being made into that matter to enable the Court to come to a conclusion about the mental condition of the person concerned. The inquiry contemplated by R.15 is undoubtedly a judicial inquiry with

notice to the party concerned or to any other person competent to speak on behalf of such party. It is for the Court to decide upon the manner in which and to the extent to which such inquiry has to be conducted to enable it to come to a satisfactory conclusion as to the mental condition of the party concerned.

It notice of such inquiry is given to the party, he may himself appear in Court and participate in the inquiry. If he appears or is brought before Court, his presence might enable the Court to form an impression about his mental condition. If it is deemed necessary he may be got examined by a medical expert and a certificate obtained from him as to whether he is mentally fit to protect his own interests. The necessity of conducting such an inquiry so that the Court may be fully satisfied that the defendant, by reason of

> unsoundness of mind or mental infirmity, is incapable of protecting his interests in the suit, has been emphasized in Mohammed Ibrahim v. Mohammed Marakayar, ILR 1949 Mad 343: (AIR 1949 Mad 292) (A) and in Balakrishnan v. Balachandran, 1956-1 Mad LJ 459 (B) where also the scope of O. 32, R. 15 had come up for consideration."

Now this very issue came to be considered by the Division Bench of this Court in Smt. Sunita Sajnani Vs. Ratan Kumar, reported in 1995 (1) WLC 520 in which case the Division Bench was called upon to decide on the correctness of the order passed by Family Court, Udaipur about the mental condition of the appellant Smt. Sunita Sajnani who was a non applicant in the suit at the instance of her husband seeking decree of divorce.

The Division Bench in that case while noticing the judgment of Orissa High Court in the case of Tirtha Pradhan vs. Balabhadra Pradhan reported in AIR 1993 Orissa 50 held that:-

> “The question of appointment of guardian will arise only after court records a finding that the defendant is a person of unsound mind and in doing so enquiry will have to be made.”

The Orissa High Court in Tirtha Pradhan & Ors V. Balabhadra Pradhan & Anr (supra) had the occasion to consider the same question in the context of the facts when the defendant in that case who was more than 90 years old appeared before the trial court in a partition suit of certain properties of a joint family. The opposite party no.2 filed an application

to allow him to act as his guardian and next friend as he (opposite party No.1) due to old age was having mental infirmity. The opposite party no.1 after his appearance was sent to Sub-Divisional Medical Officer, Deogarh for medical examination who upon his medical examination submitted a medical report that he was not able to hear properly and was not able to remember past events at times. The learned trial Court accordingly held that O.P. No.1 was physically and mentally infirm and as such was unable to protect his interest in the litigation. Accordingly the application was allowed and O.P. No.2 was ordered to be appointed as guardian of O.P. No.1. In those facts, the Court held as under:-

“In this case it is seen that no witness has been examined by the learned Subordinate Judge to take a decision as to whether the O.P. 1 was mentally infirm or not. He does not appear to have put any question to O.P. 1 to satisfy himself about his mental infirmity. The medical report submitted by the S.D.M.O., Deogarh has been relied upon by him although the S.D.M.O. himself as the report shows, had not examined O.P. 1. The S.D.M.O. has submitted the report basing on the opinion said to have been furnished by the Medical Specialist to him which has not been referred to by the learned Subordinate Judge. It is further seen that neither the S.D.M.O. nor the Medicine Specialist has been subjected to cross-examination by the petitioners. On these facts, it can hardly be said that there was any inquiry by the learned Sub-ordinate Judge to ascertain whether O.P. No.1

> was mentally infirm or not. Without such inquiry, the impugned order having been passed it can very well be said that the learned Subordinate Judge failed to exercise jurisdiction vested to him by law and as such the impugned order cannot be sustained."

The Orissa High Court still in earlier case in Mayadhar Samant Vs. Birabar Kuanr, reported in 1961 (3) OJD 259 relied upon by it in Tirtha Pradhan (supra) while considering the same question held as under:

> "The settled position in law is that in a matter like this for determination of the question of alleged insanity of a party, it is deemed necessary that the party, alleged to be insane may be got examined by a medical expert and a certificate obtained from him as to whether he is mentally fit to protect

his interest; the Court must conduct on enquiry into the alleged mental infirmity of the person and come to a definite conclusion that the alleged act is well founded before proceeding to appoint guardian for him.”

The Hon’ble Supreme Court in a recent judgment in Kasturibai & Ors. Vs. Anguri Chaudhary, reported in (2003) 3 SCC 225 also had the occasion to consider the question with regard to necessity of an enquiry for appointment of a guardian in terms of Order 32 rule 15 of CPC. In that case, while the trial court rejected the application for appointment of a guardian, but the High Court appointed such guardian even though no enquiry as contemplated by Order 32 Rule 15 (supra) was held before the trial court. In those facts, it was observed by their Lordships

that:-

> “While setting aside the said order could only issue a direction directing the learned trial Judge to hold an inquiry so as to enable it to arrive at a finding as to whether the respondent herein was incapable of protecting her interest by reason of any mental infirmity or not. As no such inquiry was held, there cannot be any doubt whatsoever that the learned Single Judge committed a jurisdictional error in passing the impugned judgment xxxxxxxx”

I have examined the facts of the present case in the light of law referred to above. It would be seen that the learned trial court in the impugned order has taken note of the fact that although the defendant Phool Chand has filed the written statement and has appeared in Court but his mere appearance in the

Court does not show that he was a man of unsound mind merely because the expert report with regard to his medical status was already available on record. It appears that the learned trial court has solely relied upon the medical report of the Superintendent, Psychiatric Centre, Rajasthan Jaipur and has not proceeded to make any enquiry to hold whether or not the said Shri Phool Chand was a man of unsound mind. A perusal of the medical report does not reveal that Superintendent, Psychiatric Center Rajasthan, Jaipur himself examined the petitioner or he ascribed the said certificate on the basis of examination conducted by any other Medical Officer of the Psychiatric Centre. Although in the report it has been stated that Shri Phool

Chand remained admitted in the hospital and was under observation for a period of 10 days but it is not known as to who examined him and by whom was he subjected to medical examination and further whether individually or by a duly constituted medical board. When the facts of the present case are analysed on the basis of the view taken by Tirtha Pradhan (supra) it should be noted that in that case too the conclusion of the Court with regard to mental incapacity of the defendant concerned was solely based on the report of the medical officer who had himself not examined the patient but had based his report on the opinion furnished by some other medical specialist though neither of them was summoned to be examined before the Court and obviously

therefore could not be subjected to cross examination by the parties.

Now adverting to Order 32 Rule 15 of the Code, the very language of it would suggest that it seeks to cover the cases falling in two categories. The first category being the persons who are adjudged by the Court of unsound mind and second being persons found by the Court on enquiry to be incapable by reason of any mental infirmity of protecting their interest when suing or being sued. The appointment of a guardian would always be depended on the satisfaction recorded by the Court either upon adjudication to the effect that the person concerned is of unsound mind or after enquiry that he is incapable by reasons of mental infirmity of protecting his interest. In either of

the categories, adjudication or the enquiry, depending on the facts of the case, as to in which category the matter would fall, is a condition precedent for appointment of a guardian. In the facts of present case, though the matter is one covered by the second category but perusal of the impugned order reveals that the learned trial court has solely based its order on the report submitted by the Superintendent, Psychiatric Center Rajasthan, Jaipur and has not made any enquiry whatsoever requiring production of either any author of the said certificate or other expert witness or even by subjecting the defendant Phool Chand to any kind of examination to form its own impression about his mental status so as to arrive at the

satisfaction that he was incapable by reason of mental infirmity of protecting his interest. Such an enquiry has rightly been insisted upon by the Legislature for protecting the interest of the person for whom the guardian is sought to be appointed by the Court.

In the light of the discussion made above, the order passed by the learned trial court cannot be sustained and is accordingly set aside. The learned trial court is directed to hold the enquiry as per the requirement of Order 32 Rule 15 C.P.C., in the manner as it may deem proper within 6 months from the date of production of copy of this order before it by either of the parties.

The writ petition is accordingly allowed with no order as to costs.

RS/ (Mohammad Rafiq),J.